

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
DUBLIN DIVISION

STEVEN M. JOHNSON,)	
)	
Plaintiff,)	
)	
v.)	CV 321-067
)	
WARDEN JERMAINE WHITE;)	
WARDEN TONJA KEITH;)	
DR. DAVID CHENEY; and,)	
NP BEVERLY MURRAY,)	
)	
Defendants.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, an inmate at Telfair State Prison (“TSP”) in Helena, Georgia, is proceeding *pro se* and *in forma pauperis* (“IFP”) in this case filed pursuant to 42 U.S.C. § 1983. Because he is proceeding IFP, Plaintiff’s complaint must be screened to protect potential defendants. Phillips v. Mashburn, 746 F.2d 782, 785 (11th Cir. 1984) (*per curiam*); Al-Amin v. Donald, 165 F. App’x 733, 736 (11th Cir. 2006) (*per curiam*).

I. BACKGROUND

Plaintiff names the following Defendants in his complaint: (1) Warden Jermaine White; (2) Warden Tonja Keith; (3) Dr. David Cheney; and (4) N-P Beverly Murray. (Doc. no. 1, p. 1.) Taking all of Plaintiff’s factual allegations as true, as the Court must for purposes of the present screening, the facts are as follows.

On July 27, 2021, Plaintiff informed unnamed TSP employees “he [had] been sick for two weeks and needed to go to medical.” (*Id.* at 2, 8.) Plaintiff was taken to medical and seen by Defendant Murray who told him “he had excess sugar in [his] urine.” (*Id.* at 3, 8.) As a precautionary measure, Defendant Murray scheduled another appointment with Plaintiff on July 30, 2021. (*Id.*) At an unknown time on July 30, 2021, Plaintiff asked a family member to call the TSP warden of care and treatment “to inform her that Plaintiff . . . [had been severely] sick for two week[s].” (*Id.* at 8.) Plaintiff was seen by a nurse and rushed to the emergency room at Dodge hospital. (*Id.* at 3, 8.) Ultimately, Plaintiff was admitted to the hospital and stayed for “about two week[s].” (*Id.* at 6.) On August 24, 2021, Plaintiff filed a grievance alleging Defendant Cheney and Defendant Murry failed to provide adequate medical care, which was denied on August 31, 2021 because it was “filed out of time frames as outlined in [the grievance] policy.” (*Id.* at 10-11.) Plaintiff did not appeal the grievance decision because the counselor “did not give [him] an appeal form.” (*Id.* at 7.)

Plaintiff now brings this action for (1) medical negligence and (2) cruel and unusual punishment against Defendant Ward, Defendant Keith, Defendant Cheney, and Defendant Murray, alleging Defendants showed deliberate indifference to Plaintiff’s medical needs and denied him adequate medical care. (*Id.* at 3.) Plaintiff seeks \$500,000 in compensatory damages “for the pain and suffering, physical injury, and emotional distress he suffered” and \$500,000 in punitive damages. (*Id.* at 3, 9.)

II. DISCUSSION

A. Legal Standard for Screening

The complaint or any portion thereof may be dismissed if it is frivolous, malicious, or fails to state a claim upon which relief may be granted, or if it seeks monetary relief from a defendant

who is immune to such relief. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). A claim is frivolous if it “lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989). “Failure to state a claim under § 1915(e)(2)(B)(ii) is governed by the same standard as dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6).” Wilkerson v. H & S, Inc., 366 F. App’x 49, 51 (11th Cir. 2010) (*per curiam*) (citing Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997)).

To avoid dismissal for failure to state a claim upon which relief can be granted, the allegations in the complaint must “state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). That is, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555. While Rule 8(a) of the Federal Rules of Civil Procedure does not require detailed factual allegations, “it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Iqbal, 556 U.S. at 678. A complaint is insufficient if it “offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action,’” or if it “tenders ‘naked assertions’ devoid of ‘further factual enhancement.’” Id. (quoting Twombly, 550 U.S. at 555, 557). In short, the complaint must provide a “‘plain statement’ possess[ing] enough heft to ‘sho[w] that the pleader is entitled to relief.’” Twombly, 550 U.S. at 557 (quoting Fed. R. Civ. P. 8(a)(2)).

Finally, the Court affords a liberal construction to a *pro se* litigant’s pleadings, holding them to a more lenient standard than those drafted by an attorney. Erickson v. Pardus, 551 U.S. 89, 94 (2007); Haines v. Kerner, 404 U.S. 519, 520 (1972). However, this liberal construction

does not mean that the Court has a duty to re-write the complaint. Snow v. DirecTV, Inc., 450 F.3d 1314, 1320 (11th Cir. 2006).

B. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted Because He Did Not Exhaust Administrative Remedies

1. The Exhaustion Requirement

Section 1997e(a) of the Prison Litigation Reform Act (“PLRA”) provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Dismissal for failure to state a claim is appropriate if it is clear from the face of a complaint that the plaintiff failed to exhaust administrative remedies. See Jones v. Bock, 549 U.S. 199, 215 (2007); Bingham v. Thomas, 654 F.3d 1171, 1175 (11th Cir. 2011) (*per curiam*); Solliday v. Federal Officers, 413 F. App’x 206, 208 (11th Cir. 2011) (*per curiam*); Anderson v. Donald, 261 F. App’x 254, 256 (11th Cir. 2008) (*per curiam*). The PLRA’s mandatory exhaustion requirement “applies to all prisoners seeking redress for prison circumstances or occurrences.” Porter v. Nussle, 534 U.S. 516, 520 (2002). Moreover, the Court does not have discretion to waive the requirement, even if it can be shown that the grievance process is futile or inadequate. See Smith v. Terry, 491 F. App’x 81, 83 (11th Cir. 2012) (*per curiam*); Alexander v. Hawk, 159 F.3d 1321, 1325 (11th Cir. 1998). Rather, “[t]his provision entirely eliminates judicial discretion and instead mandates strict exhaustion, ‘irrespective of the forms of relief sought and offered through administrative avenues.’” Johnson v. Meadows, 418 F.3d 1152, 1155 (11th Cir. 2005) (citing Booth v. Churner, 532 U.S. 731, 741 n.6 (2001)).

Furthermore, the PLRA also “requires proper exhaustion.” Woodford v. Ngo, 548 U.S. 81, 93 (2006). In order to properly exhaust his claims, a prisoner must “us[e] all steps” in the

administrative process; he must also comply with any administrative “deadlines and other critical procedural rules” along the way. *Id.* at 90 (internal quotation omitted). If a prisoner fails to complete the administrative process or falls short of compliance with procedural rules governing prisoner grievances, he procedurally defaults his claims. Johnson, 418 F.3d at 1159.

Also, because exhaustion of administrative remedies is a “precondition” to filing an action in federal court, the Eleventh Circuit requires prisoners to complete the administrative process *before* initiating suit. Poole v. Rich, 312 F. App’x 165, 166 (11th Cir. 2008) (*per curiam*); see also Higginbottom v. Carter, 223 F.3d 1259, 1261 (11th Cir. 2000). Finally, under the PLRA, the Court has no discretion to inquire into whether administrative remedies are “plain, speedy, [or] effective.” Porter, 534 U.S. at 524; see also Alexander, 159 F.3d at 1326. Rather, under the PLRA’s “strict exhaustion” requirement, administrative remedies are deemed “available” whenever ““there is the possibility of at least some kind of relief.”” Johnson, 418 F.3d at 1155, 1156. “Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit.” Porter, 534 U.S. at 524.

2. Administrative Grievance Procedure at TSP

The administrative grievance procedure is governed by the version of the Georgia DOC Standard Operating Procedure that resulted in the promulgation of Policy Number (“PN”) 227.02, which became effective May 10, 2019.¹ The grievance procedure has two steps: (1) Original Grievance, and (2) Central Office Appeal. PN 227.02 § IV(C). The administrative remedies procedure commences with filing an Original Grievance via the Kisok/Tablet or with

¹DOC policies cited herein are publicly available on the DOC web site. See www.dcor.state.ga.us; *follow link for Policies & Procedures and then Facilities Division; click on* link for desired PN.

a counselor. Id. § IV(C)(1)(c) & (d). The inmate has ten calendar days “from the date the offender knew, or should have known, of the facts giving rise to the grievance” to file the grievance. Id. § IV(C)(1)(b). The timeliness requirements of the administrative process may be waived upon a showing of good cause. Id. The grievance coordinator screens the grievance to determine whether to accept it for processing or recommend the Warden reject it. Id. § IV(C)(1)(e)(i). The grievance may be rejected, *inter alia*, if it raises one of the listed non-grievable issues, includes threats or insults, or raises more than one issue/incident. Id. § IV(C)(1)(e)(ii).

The policy requires the Warden provide a response to the prisoner who filed the grievance within forty calendar days from submission of the original grievance; a one-time ten-calendar-day extension may be granted. Id. § IV(C)(1)(f)(v). If the grievance is rejected, or if the time allowed for a response to the grievance has expired without action, the offender may proceed to step two of the grievance process, a central office appeal. Id. § IV(C)(1)(e)(v) & (c)(1)(f)(viii); § IV(C)(2). The inmate has seven calendar days from the date he receives the Warden’s response to the grievance to file a central office appeal, but this time limit may be waived for good cause. Id. § IV(C)(2)(b). The Commissioner or his designee then has 120 calendar days after receipt of the grievance appeal to deliver a decision to the prisoner who filed the appeal. Id. § (C)(2)(e). If the central office appeal results in a determination the original grievance should have been accepted by the facility and processed, the grievance will be returned to the facility for investigation, and the Warden has fifteen calendar days from receipt of the returned grievance to give a decision to the prisoner who filed the grievance. Id. § (C)(2)(g). The prisoner has seven calendar days from receipt of the Warden’s second response to file a second central office appeal. Id.

3. Plaintiff's Failure to Exhaust

The face of Plaintiff's pleading makes clear (1) he did not timely file his Original Grievance, nor (2) complete the two-step grievance process because he did not file an appeal. In the complaint, Plaintiff included the Original Grievance which was filed on August 24, 2021, more than ten days after he was taken to the hospital and the facts underlying his claim were known to him. (Doc. no. 1, p. 11.) Even if we assume Plaintiff has shown good cause for failing to timely file the Original Grievance due to his stay in the hospital,² Plaintiff concedes he did not file an appeal because the counselor "did not give him an appeal form." (*Id.* at 7.) Plaintiff does not claim he was incapable of obtaining an appeal form, or unable to file an appeal via the Kiosk or Tablet. PN 227.02 § IV(C)(f)(viii). Nor does the operating procedures require the Warden to provide an appeal from upon providing his response. Thus, the face of Plaintiff's pleading makes clear he did not complete the two-step grievance process because he did not file an appeal. That is, Plaintiff improperly bypassed the appeals process when he decided not to file a central office appeal once his original grievance was denied.

Allowing Plaintiff to file his grievance outside of the time frame outlined in the grievance policy and bypass the appeals process defeats the rationale behind requiring "proper exhaustion":

The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules. A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction. . . . For example, a prisoner wishing to bypass available administrative remedies could

²In the complaint, Plaintiff indicates he was hospitalized for "about two weeks." (Doc. no. 1, p. 6.) Thus, he returned to TSP sometime around August 13, 2021. While it is possible Plaintiff filed the Original Grievance within ten calendar days of his return to TSP, he failed to explain his untimeliness in the prompted space on the grievance form. (Doc. no. 1, p. 11.)

simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. And acceptance of the late grievance would not thwart the prisoner's wish to bypass the administrative process; the prisoner could easily achieve this by violating other procedural rules until the prison administration has no alternative but to dismiss the grievance on procedural grounds. We are confident that the PLRA did not create such a toothless scheme.

Woodford, 548 U.S. at 95; see also Pavao v. Sims, 679 F. App'x 819, 823 (11th Cir. 2017) (*per curiam*) ("To satisfy the exhaustion requirement, a prisoner must complete the administrative process in accordance with the applicable grievance procedures set by the prison.").

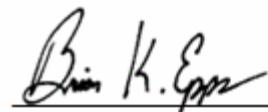
Similarly here, allowing Plaintiff to proceed in federal court despite failing to timely file his Original Grievance and attempting to short circuit the grievance process by not filing an appeal would defeat the aims of PLRA to review the merits of a prisoner's claim(s), and would not promote "the corrective action that might have obviated the need for litigation, . . . filter . . . potential frivolous claims, . . .[or] develop[] . . . an administrative record to assist the courts in deciding the controversy." Johnson, 418 F.3d at 1159. The PLRA requires proper exhaustion of available administrative remedies prior to filing a federal lawsuit, which includes adherence to the grievance policy's filing period and compliance with procedural rules governing prisoner grievances. Id. Even if Plaintiff's failure to timely file the Original Grievance is excused by a showing of good cause, Plaintiff had to complete the *entire* administrative grievance procedure to properly exhaust administrative remedies, which is a "precondition" to filing an action in federal court. Higginbottom, 223 F.3d at 1261. It is plain from the face of Plaintiff's complaint; indeed he concedes, that he failed to complete the entire grievance process prior to commencing this case. (Doc. no 1, p. 6.)

In sum, Plaintiff did not properly exhaust his available administrative remedies, and therefore, the complaint fails to state a claim upon which relief can be granted. See Solliday, 413 F. App'x at 208 ("A claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted.").

III. CONCLUSION

For the reasons set forth above, Plaintiff failed to exhaust his administrative remedies prior to filing his lawsuit. Therefore, the Court **REPORTS** and **RECOMMENDS** the case be **DISMISSED** without prejudice and that this civil action be **CLOSED**.

SO REPORTED and RECOMMENDED this 25th day of March, 2022, at Augusta, Georgia.



BRIAN K. EPPS
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA